moves toward the trooper and that the Defendant was not advised of his rights (T-49).

On direct examination SHERIFF HUBERT HARRIS, Wilson County, Kansas, stated that Trooper Wiltse advised Defendant he was going to ask him some questions which would be used against the Defendant (T-55); that Mr. Walker didn't answer any of the questions while the Sheriff was present (T-55); and that Mr. Walker was very uncooperative (T-55).

On cross-examination he stated that his opinion of intoxication was based on the uncooperativeness of the Defendant (T-59); and that Defendant refused to answer questions (T-60).

After Sheriff Harris completed his testimony, Attorney Russell Shultz moved for the Court to discharge the Defendant from the charges brought against the Defendant, namely: Count I, which charged a violation of Sec. 8-235; Count II, which charged a violation of Sec. 8-531, and Count III, which charged a violation of Sec. 8-530, K.S.A.

The Court overruled Defendant's motion as made by Attorney Shultz, on all three counts.

The Defendant, Robert M. Walker, then took the witness stand and was asked to state what happened. He stated that as he and Trooper Wiltse were proceeding up the sidewalk to the Jail, his wife, Geraldine, asked him what she should do; that he told her to get an attorney (T-74); that for the time being he wanted her to stay around the

premises as he was going to need a witness; that Trooper Wiltse told her to get out of there and grabbed her and flung her violently up against a brick parapet (T-74 & 75); that Trooper Wiltse took the Defendant inside the Jail (T-75); that Trooper Wiltse started asking questions after the parties were inside the Jail (T-75); that Trooper Wiltse slugged the Defendant when Defendant called out to his wife to remain in the vicinity as a witness (T-75); that Defendant was not threatening Trooper Wiltse at any time (T-75); that, after the slugging, Trooper Wiltse continued to ask questions of the Defendant (T-76); that, on several occasions, he told Trooper Wiltse he would take any sobriety test so long as an independent witness was present (T-76); that Trooper Wiltse refused to allow an independent witness to be present (T-77); and that Trooper Wiltse stated that Defendant was going to be in Jail until Monday morning and Trooper Wiltse chortled with glee. (At this point the Court admonished the Defendant in severe tones and manner of admonition to just answer questions, though this was part of Defendant's answer to questions asked, and had the Defendant's answer stricken from the record, and the jury was admonished to ignore and disregard it.) (T-77). That Trooper Wiltse, on the way into Fredonia, asked Defendant to take an alcohometer or blood alcohol test and in response thereto Defendant told Trooper Wiltse he would be happy to take any chemical test, but wanted a physician present (T-73) and that Trooper Wiltse did not ask a second time for the Defendant to take a blood alcohol chemical test at the county jail (T-78).

On cross-examination the Defendant was asked if he had a driver's license and Attorney Shultz objected to the question as being improper. (T-78). The Court overruled the objection and directed the Defendant to answer the question. (T-78).

Mrs. Geraldine Walker testified for the Defendant and in essence confirmed all testimony of the Defendant except that she did state Defendant tried to have a blood alcohol test taken by a doctor recommended by Attorney Steven A. Rogers, but a test could not be taken as no vial was available.

Trooper Wiltse testified again.

Attorney Shultz objected to instruction regarding Count I, violation of Sec. 8-235.

The Court overruled Defendant's objection to instruction in Count I.

INSTRUCTIONS
No. 1

The Information filed by the county attorney in behalf of plaintiff, The State of Kansas, charged the defendant, Robert M. Walker, with three separate criminal offenses. In all of them it is claimed that on or about September 4, 1965, on Highway K-96 in Wilson County, Kansas, the defendant was driving a certain motor vehicle, a 1959 Mercury bearing 1965 Kansas License No. SG-122568.

Count 1 charges that the defendant was driving said motor vehicle without first obtaining a valid operator's or chauffeur's license.

Count 2 charges that the defendant drove said motor vehicle in such a manner as to constitute what is known as reckless driving, which will be defined for you later.

Count 3 charges that defendant was driving said motor vehicle while under the influence of intoxicating liquor.

To all three charges the defendant has entered his plea of not guilty, and it is the question of his guilt or innocence that you are to determine by your verdict.

You can see that three separate charges are being tried together. You will consider them separately as if each one were being tried by itself, and you will return separate verdicts.

No. 2

The statutes of this State provide that no person, with some exceptions which do not apply here, shall drive any motor vehicle upon a highway in this State unless such person has a valid license as an operator or a chauffeur. Any person who violates such provision shall be guilty of a misdemeanor.

You cannot find the defendant guilty under Count 1 of the Information unless you find from the evidence beyond a reasonable doubt that the defendant did drive a motor vehicle upon a highway at the time and place mentioned and that he did not then have a valid operator's or chauffeur's license.

The statute further provides that a defendant cannot be found guilty if, at the trial or before, he produces a li-

cense which was valid at the time of the arrest.

No. 3

Concerning Count 2 the applicable statute provides that any person who drives any vehicle in wilful or wanton disregard for the safety of persons or property is guilty of reckless driving.

The term "wilful" is easily understood. It means purposely and intentionally, not accidentally.

"Wanton" conduct is something less than wilful although to be wanton the conduct must be such as to show a disregard of or indifference to consequences even though no harm was actually intended.

You can see that either wilful or wanton conduct will support the charge. You are instructed, however, that you cannot find the defendant guilty under Count 2 unless you find from the evidence beyond a reasonable doubt that he did drive a vehicle at the time and place mentioned in wilful or wanton disregard for the safety of persons or property.

No. 4

Concerning Count 3, the applicable statute provides that it is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this State. In order to find the defendant guilty of this charge you must be persuaded by the evidence beyond a reasonable doubt that the defendant did drive a vehicle at the time and place mentioned and that he was at that time under the influence of intoxicating liquor, as that expression is defined later in these instructions.

No. 5

The burden of proof is upon the State of Kansas to prove the defendant's guilt beyond a reasonable doubt, and this burden does not shift to the defendant at any stage of the trial. The defendant is presumed to be innocent of the charge against him and innocent of each and every essential ingredient of the charge, and this presumption of innocence abides with him throughout the trial and until such time as in your deliberations you are convinced by the evidence that his guilt has been established beyond a reasonable doubt. Until and unless you are so convinced the defendant is entitled to the benefit of this presumption of innocence and you must acquit him.

No. 6

Beyond a reasonable doubt does not mean that you must be convinced beyond any possible doubt, for there is some doubt connected with all human affairs. Beyond a reasonable doubt means that after weighing the evidence you must feel to a moral certainty that the defendant is guilty of the charge. As the term implies the doubt must be based upon reason, not imagination or emotion. After considering all of the evidence if you are not convinced beyond a reasonable doubt of the guilt of the defendant then you must acquit him.

No. 7

You are instructed that the phrase "under the influence of intoxicating liquor" does not mean that the defendant must have been drunk as that term is commonly used. It means that the liquor consumed must have impaired his

ability to operate his automobile to the degree that he was not able to operate it with safety to himself and to the public. A person who has taken a drink of liquor may not be under its influence. It must be shown that there was an impairment of the defendant's driving ability resulting from the liquor consumed.

As used in these instructions the terms "intoxicating liquor" and "alcoholic liquor" have the same meaning.

No. 8

The defendant has the right to testify in his own behalf as he has done in this case. His credibility as a witness and the weight to be given to his testimony are matters exclusively for you to determine, and you are to apply the same standards and rules that are given to you in other instructions for appraising the testimony of witnesses generally.

No. 9

It is the duty of the jury to decide the question of the guilt or innocence of the defendant and you are not concerned with the penalty in case of conviction. Guilt or innocence does not depend on the penalties fixed by law for an offense, but upon the evidence, and in arriving at your verdict you should lay aside any and all considerations of bias, prejudice, or sympathy, either for or against the defendant, and endeavor to reach a verdict based wholly upon the evidence and the instructions of the Court.

No. 10

Each verdict must be the result of twelve minds reaching the same conculsion. Every juror has the obligation to

confer with his fellow jurors and to attempt to reconcile differences in their views; however, each juror is required to exercise his own independent judgment and must be convinced in his own mind of the proper verdict to be reached in this case. Until all twelve of you so agree a verdict cannot be returned. All of the Court's instructions are directed to all three of the offenses charged insofar as they are applicable, and taking each charge separately you must all agree on a verdict of guilty or not guilty as to such charge.

No. 11

You are the exclusive judges of all the facts and circumstances in the case, the weight of the evidence, and the credibility of the witnesses. In determining what weight is to be given to the testimony of the different witnesses, you may take into consideration their relation, if any, to any of the parties interested in the result of the trial, the interest, or lack of interest, of any witnesses in the result of the trial, their temper, feeling and bias, if any has been shown, and their demeanor while testifying; and you will give such credit to the testimony of each witness as, under all the evidence, facts and circumstances of the case, it seems to be entitled to receive. If you believe, from all the evidence before you, that any witness has wilfully or knowingly testified falsely with reference to any material matter in controversy, then you are at liberty to disregard his entire testimony, but you are not obliged to do so. You may disregard a portion of his testimony and give to every other portion of the testimony of any witness greater weight and credit than

you may give to some other part of his or her testimony. You have the right to weigh every portion of the testimony of every witness and give to each portion of the testimony just such consideration as it is entitled to receive considering all the evidence, facts and circumstances in the case.

No. 12

Candidly consider the evidence, free from any bias, prejudice, fear, or favor, and arrive at your verdict from all the evidence submitted to you, and from the law as the Court has given it to you in these instructions.

Elect one of your number foreman. When you have agreed upon your verdict on a particular count have the foreman sign the appropriate form, guilty or not guilty as the case may be. After this has been done on all three counts advise the bailiff that you have reached your verdict and he will see that you are returned into Court.

/s/ George W. Donaldson
Judge

VERDICT

On the 12th day of March, 1966, the Defendant, Robert M. Walker, was found guilty and adjudged to pay a fine in the sum of Three Hundred Dollars ($300.00), and was sentenced to the County Jail for ninety (90) days, on each of three counts, the sentences to run concurrently and to pay the costs of the prosecution.

MOTION FOR NEW TRIAL

COMES NOW the defendant, Robert M. Walker, and moves the Court for an order granting him a new trial for the following reasons:

1. For the reason that the Court admitted improper testimony.
2. Because of the misconduct of the jury, preventing fair trial and due consideration of the case.
3. For the reason that the verdict was decided by means other than fair expression on the part of the jurors.
4. The Court misdirected the jury in material matters of law.
5. For the reason that the Court made erroneous rulings with regard to testimony in the case.
6. For the reason that the verdict is contrary to the law and evidence.

SHULTZ & KIRBY
/s/ Russell Shultz
Russell Shultz, Attorney for Defendant.

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing Motion was mailed to Mr. Donald C. Vosburgh, County Attorney, this 16th day of February, 1966.

/s/ Russell Shultz

Which Motion was on the 12th day of March, 1966, overruled.

NOTICE OF APPEAL

TO: Donald C. Vosburgh, Attorney for the Plaintiff.

Take notice that the defendant in the above entitled action intends to, has and does appeal to the Supreme Court of the State of Kansas from the findings and judgment rendered and made in the above entitled action in favor of the plaintiff on the 12th day of March, 1966.

Dated this 16th day of March, 1966.

SHULTZ & KIRBY

/s/ Russell Shultz

Attorney for Defendant.

ACKNOWLEDGMENT OF SERVICE

I hereby acknowledge receipt of a copy of the Notice of Appeal filed in the above case on this 16th day of March, 1966.

/s/ Donald C. Vosburgh

VERDICT OF THE SUPREME COURT OF THE STATE OF KANSAS

The judgment of the District Court of Wilson County, Kansas was reversed as to Count I and affirmed as to Counts II and III in all respects.

SHULTZ & KIRBY
Attorneys at Law
331 South Hydraulic
Wichita, Kansas 67211
Telephone: AM 7-5309

IN THE SUPREME COURT OF THE STATE OF KANSAS

THE STATE OF KANSAS,

Appellee,

vs.

ROBERT M. WALKER,

Appellant.

MOTION FOR REHEARING

Case No. 44,625

COMES NOW the Appellant and moves this Court for rehearing on Counts II and III of the judgment appealed from, which are those parts only which were affirmed by this Court, for the following reasons:

The Appellant herein is a member of the Bar of this State. At the time the Abstract and Brief in this appeal were prepared, Appellant chose to prepare them for himself because of financial reverses recently suffered. Counsel of record now feels that the points of the appeal were not sufficiently clear to advise this Court of the real basis therefor.

With regard to Count II in which the defendant was charged with driving "in such a manner as to indicate a wilful and wanton disregard for the safety of persons or property" in violation of K.S.A. 8-531, the only evidence of the manner of driving itself was that several times in going up a hill the vehicle of the defendant crossed the center line of the highway, on one occasion in a no-passing zone. The terrain was hilly, the speed limit in that area is 45 M.P.H. The defendant was within the speed limit.

It is the position that this, without more, does not constitute reckless driving, and in and of itself does not

come within the statutory definition of indicating a wilful or wanton disregard for the safety of either persons or property.

Granting, as is argued by the State and as stated by this Court, that there need be no accident or injury to constitute reckless driving, still it must be agreed that reckless is a relative matter. Therefore, it would seem reasonable to require that there be a showing that the manner of driving was such that there was a clear danger of losing control of the vehicle, or that in complete control, which is a presumption, that there was in fact, danger to someone or something. It is submitted that the left hand wheels crossing to the left of the center line, even on the upgrade of a hill, and where the highway is marked, shows neither. In this connection it should be remembered that the cars behind the vehicle were in no position to pass the defendant, both because of the speed limit and because of the hill and no-passing zone, and that there were no automobiles approaching from the opposite direction.

This is, of course, a violation of K.S.A. 8-537, but this violation, without more, is not recklessness. Analogous to this are the situations in which it has been claimed that the violation of a 'Rule of the Road' constitutes actionable negligence. This Court has held that this does not necessarily follow. In *Gardner v. Leighton* 144 K. 335, 58 P. 2d 1111, Justice Dawson wrote at page 338: "Defendants emphasize the fact that plaintiff's automobile was traveling on the south side of the road. True, but the used portion of the road was only about 12 feet wide in that vicinity.

Moreover, when a motorist, so far as he can see, has the entire road to himself, he may travel on any portion of it, in the middle or on either side." The above decision was rendered in 1936, and the following year the Legislature enacted what is now K.S.A. 8-537, limiting driving to the right side of the highway, excepting under certain conditions and for certain purposes. Subsequently, the case law indicates that if such driving on the left side of the highway is the proximate cause of an accident, then it does constitute actionable negligence. However, in *Beecher v. Stepanian* 170 K. 201, 224 P. 2d 1017, at page 205 it is said "We recognize that not every violation of a statute convicts the actor of actionable negligence".

Thus we see that a violation of K.S.A. 8-537 cannot constitute a violation of 8-531 K.S.A. unless other elements are present. In this case the State took the position and this Court evidently subscribed to the position that the additional element was the fact that the defendant-appellant was under the influence of intoxicating liquor. This is indicated by the Court's statement on page 5 of its original opinion to the effect that:

> "Moveover, Wiltse's testimony that the defendant's automobile crossed the center line four or five times and went up a hill in a "no passing" zone on the wrong side of the highway for about 75 yards where the terrain was hilly and the traffic was heavy, and the defendant was under the influence of intoxicating liquor *(State v. Sullivan,* supra; *State v. Sisneros,* 42 N.M. 500, 82 P. 2d 274; 7 Am Jur. 2d, Automobiles and Highway Traffic, Section 264, p. 816), tended

> to disclose the defendant's conduct was such as to evince disregard or indifference to consequences, and was sufficient for the jury to reasonably draw an inference of guilt."

The key then must be that the Appellant was under the influence of intoxicating liquor. But, how was this shown by the State? Of course, first by showing that he crossed the center line of the highway. The statement of the State and of this Court as set out in the above quotation is considerably broader than the evidence disclosed. The evidence was to the effect that the Appellant crossed the center line with his left wheels five or six times, but that he straddled the center line and never got all four wheels to the left of the line. (T-18).

The sum of the evidence regarding intoxication was the testimony of Trooper Wiltse, stated as follows: Cross-examination T-31.

A: I felt he was under the influence.

Q: I'll ask you, what was — were the factors that brought you to that conclusion at that time?

A: Well, by his weaving on the road, crossing the center line numerous times, the fact that when he got out of the car he was unsteady on his feet, he was of a belligerent attitude and he refused to show his driver's license.

In addition to the above, the Trooper testified that the Appellant had an odor of alcohol on his breath. To enumerate them the State's evidence was that:

1. Appellant was weaving on the highway so that his wheels crossed the center line on five or six occasions.

2. Appellant swayed when he walked from his car.

3. Appellant had an odor of alcohol on his breath.

4. Appellant was belligerent and uncooperative.

Discussing these in order, #1 has been pretty well discussed above.

The evidence regarding #2 was by the testimony of the Trooper at page 29 of the transcript that Walker was unsteady on his feet, but he stated clearly that he was not staggering. Then, on pages 43 and 44 the Trooper stated that he did not give the Appellant any sobriety test because he could tell he was under the influence because he was unsteady on his feet. The Trooper admitted that there are many things which can cause unsteadiness other than being under the influence, such as physical impairments, but that he did not inquire about this possibility.

Concerning factor #3, it is well known that a mere odor of alcohol, which incidentally is invariably described by an arresting officer as STRONG, does not necessarily make one under the influence.

If we assume, then, that the conclusion of the Trooper concerning factor #4 was correct, it is the position of Appellant the evidence in its entirety was not sufficient basis to justify the ultimate conclusion of the officer that the Appellant was, or had been, driving under the influence of intoxicating liquor.

There was no other testimony concerning the appearance of the Appellant, such as eyes, complexion, speech, clothing, tidiness, general appearance or general coordination other than the walk, which could even remotely be indicative of intoxication. It must, therefore, be presumed that these factors were all favorable to the Appellant. This is particularly true when it is remembered that the Appellant offered to take any test submitted if he could first talk with a lawyer, or in the alternative, if the Trooper would obtain one independent person to observe the tests as a witness. This was refused by the officer simply because he was not required to do so. (T-45).

At the time the Trooper stated his conclusion that the Appellant was under the influence, objection was made on the grounds that there had been shown no qualifications on the part of the officer and also that there was no proper foundation or basis for the conclusion shown, which objection was overruled. (T-10-11). This was error on the part of the trial court. Even with this conclusion, however, a fair and proper prima facie case was not established and the Appellant should have been discharged.

At the close of the State's evidence, the Appellant moved that the State be required to elect, and that the Appellant be discharged upon or from both counts, which motion was overruled.

We, therefore, have the result that a person is convicted of a traffic offense which is commonly known as reckless driving, and of another offense of driving while under the influence of intoxicating liquor, upon precisely

the same facts. The Appellant contended at trial and still contends that if all the above discussed factors are considered together this case is controlled by *State v. McLaughlin*, 121 K 693 and that the Appellant's conduct — "constituted a single criminal delinquency and not two distinct crimes carrying separate and successive punishments—". If on the other hand, the above factors can be separated, then the Appellant should be discharged from both.

There is one other subject, however, that in the opinion of counsel should be re-examined. The State presented evidence of the Appellant's refusal to take a blood alcohol test, and the refusal to answer other questions to support the position that the Appellant was under the influence, by showing that he was belligerent and uncooperative. This was improper, as a violation of the Appellant's constitutional rights, and prejudiced the Appellant in the eyes of the jury, which it was carefully calculated to do, and constitutes plain error.

Trooper Wiltse testified that he determined the Appellant to be belligerent from the fact that the Appellant's first words on his vehicle being stopped were "What do you want" in a belligerent tone. On cross-examination, he was asked if he determined this belligerence from the tone of voice and he indicated that he had. He then stated that he asked for identification but that the Appellant replied that he didn't have his driver's license and didn't have to show him any identification. In the fiasco which occurred at the point of arrest, the Trooper put Appellant in his car and on the way to town asked him again his name and his

age and whether or not he would take a blood alcohol test. This was all refused. The Appellant indicated that he intended to remain silent and requested that before he answer any questions he wished to consult with counsel. He tried to get his wife to go someplace and obtain a lawyer after their arrival in town. This disturbed the Trooper because he did not want Mr. and Mrs. Walker talking together. He admitted that Mr. Walker told him he would take sobriety tests if he could consult with a lawyer or if an independent witness were obtained. This was refused by the officer. After arrival at the jail, notwithstanding the indication of the Appellant that he wished to remain silent, the Trooper advised him again that he was going to ask him some questions that would be used against him in court and did ask him questions and reiterated the request for a blood alcohol test. The officer testified that this was the uncooperative and belligerent attitude demonstrated by the Appellant, and that this was one of the factors that he considered in determining that in his opinion, the Appellant was under the influence of intoxicating liquor.

The point which Appellant attempted to make in the original brief included nothing new from the *Miranda v. Arizona,* 384 U.S. 436 16 Law Edition 2d, 694, and 86 Supreme Court 1602, excepting that the rule as there laid down, states that once an accused advises an interrogating officer that he wishes to consult with counsel and remain silent, that interrogation must cease. It is true, as this Court stated in its original opinion, that under the holding of *Johnson v. N. J.,* 384 U.S. 719, 16 Law Edition 2d 882,

86 Supreme Court 1772, it was held that the Miranda case applied only prospectively from the date of the decision, holding at the same time that *Escobedo v. Illinois* 378 U.S. 478 12th Law Edition 2d 977, 84 Supreme Court 1758, was to be applied prospectively only after June, 1964. However, the real proposition here presented is whether or not it is proper for the officer to continue to question an accused after he has indicated his intent to remain silent, so that the refusal to answer questions can be pointed up to the jury, to the prejudice of the accused.

It would appear that the rule in Escobedo, that is, the right to counsel, arose in this case immediately upon the stopping of Appellant's car on the highway by the Trooper. When this right was insisted upon by the Appellant, it was improper for the officer to continue to ask questions directly for the purpose of pointing up to the jury Appellant's insistence upon a constitutional right of silence and of counsel as being belligerent and uncooperative. It is true that the Appellant did not make answers which, for their substance, could be used against him, but his refusal to answer was used against him.

It has long been the rule that comments upon a defendant's refusal to testify or to answer questions made to a jury by either the Judge or the prosecuting attorney is plain error. Why, then, is it not plain error for an arresting officer to testify with regard to the insistence upon these constitutional rights, together with his conclusion that because of them, a defendant was belligerent and uncooperative, and to conclude that this was an indication of

intoxication, which was a material element in this instant case. Subject to the same line of reasoning, is the refusal to take a blood alcohol test. Section 8-1001 K.S.A. which provides a presumption of consent to submit to a chemical test for the purpose of determining the alcoholic content of one's blood, clearly provides that "If the person so arrested refuses a request to submit to a test it shall not be given" . . . it would seem to be true, therefore, as the Court says, that the request of the officer to the defendant to take a test does not violate his constitutional right, but to use the refusal against him before a jury, again to indicate belligerence and a lack of cooperation with the intent to show that this is indicative of intoxication, which was a material element in this case, was improper and prejudicial.

It is the Appellant's position that his right to remain silent, his right to consult with counsel, and his right given by statute to refuse a blood alcohol test, were all matters of clear right which were not subject to being commented upon by the court or by counsel or by the prosecuting witness. Again, it should be remembered that the prosecuting witness agreed that the Appellant offered to submit to tests of any matter if the officer would either allow him to consult with counsel or obtain an independent witness, which was tantamount to offering to demonstrate his innocence, and that this offer was refused by the Trooper.

This Court recently made a determination in *State v. Dearman* 198 K. 44, in which it was stated: "It is reversible error to permit a jury to draw an inference adverse to one accused of crime from his reliance upon his constitu-

tional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense." The Court followed the holding in *Fagundes v. U.S.*, 340 Fed. 2d 673 and held that this case was persuasive and in that regard stated: "We think the foregoing decision is persuasive and hold that evidence disclosing that one charged with crime has asserted his constitutional right to counsel, and his constitutional right to remain silent, cannot be used against him substantively as an admission of guilt." This holding did not differentiate between court, counsel or witness.

It is submitted that to elicit testimony by letting the comments come from the officer's mouth rather than direct from counsel is still within the rule and that that holding controls the situation in this case.

If this rule is applied, we find then, that one of the factors which the officer considered as bearing upon intoxication, must fall by the wayside, leaving as the sole basis the weaving of the automobile, the swaying walk and an odor of alcohol to constitute reckless driving and driving under the influence. For these reasons, therefore, this Appellant respectfully requests this Court to grant a rehearing in this matter.

In making a decision upon this question, Appellant would further urge upon the Court that the Court examine the original transcript of the trial. While it hardly need be stated to this Court the case of this kind involving a member of this Bar, who is in good standing, is of prime im-

portance, and for this reason Appellant would request that the Court allow further oral argument herein.

In the alternative, the Appellant hereby requests that if this motion is summarily overruled, that this Court withhold the issuance of its mandate and make an order staying the execution of judgment and sentence herein under provisions and conditions authorized by Title 28, Section 2101(F) U.S.C.A. so that this Appellant may make application to the Supreme Court of the United States for a writ of certiorari.

Respectfully Submitted,
/s/ Russell Shultz
Russell Shultz, Attorney for Appellant.

Which motion was denied on August 31, 1967.

AFFIDAVIT OF PERJURY

Under date of November 20, 1967, the Defendant filed with the Clerk of the District Court, Wilson County, Kansas, an Affidavit of Perjury, which states as follows:

IN THE DISTRICT COURT OF
WILSON COUNTY, KANSAS

STATE OF KANSAS,

Plaintiff,

vs.

ROBERT M. WALKER,

Defendant.

No. 18809

AFFIDAVIT OF PERJURY

STATE OF KANSAS
SEDGWICK COUNTY
ss:

ROBERT M. WALKER, Defendant in the above captioned matter, being first duly sworn, deposes and states:

That on February 14th and 15th, 1966, Trooper Walter Wiltse of the Kansas Highway Patrol, appearing as a witness for the plaintiff in the captioned matter testified falsely and feloniously and particularly as follows:

1. That on September 4, 1965, he saw vehicle driven by defendant cross the center line several times, and on one particular occasion the vehicle crossed the center line on an incline or a hill. (Page 6 of Transcript).

2. That when he put the red light on the woman in the car dumped the contents of a glass out of the window. (Page 7 of Transcript).

3. That when the defendant got out of his vehicle he stated in a very belligerent tone "What do you want?" (Page 7 of Transcript).

4. That defendant in response to a question asked on the way in to Fredonia, Kansas, refused to take an alcoholic chemical test. (Page 10 of Transcript).

5. That defendant again refused to take a chemical test in response to request made in the presence of Sheriff Harris. (Page 10 of Transcript).

6. That vehicle driven by the defendant was weaving

on the road. (Page 16 of Transcript).

7. That defendant drove up the hill on the wrong side of the road. (Page 17 of Transcript).

8. That he saw defendant drive over onto the left side of the road on numerous occasions, probably four or five times. (Page 17 of Transcript).

9. That defendant was driving on both sides of the road. (Page 24 of Transcript).

10. That defendant did not ask him what was the matter and that defendant asked what the Trooper wanted. (Page 28 of Transcript).

11. That defendant was weaving on the road, crossing the center line numerous times, and that when defendant got out of the car he had a belligerent attitude. (Page 31 of Transcript).

12. That defendant indicated a belligerent attitude by his first words uttered, which were "What do you want?" (Page 36 of Transcript).

13. That he did not slam defendant against the front of the Highway Patrol vehicle. (Page 36 of Transcript).

14. That Mrs. Walker did not tell him defendant's name. (Page 38 of Transcript).

15. That defendant, in response to a request to take a blood test, stated: "No, I won't take a blood test." (Page 39 of Transcript).

16. That defendant did not, at the time of the fore-

going request, make any reference to a doctor. (Page 39 of Transcript).

17. That he asked the defendant a second time to take a blood test in the County Jail. (Page 40 of Transcript).

18. That defendant refused again to take a blood test. (Page 40 of Transcript).

19. That defendant positively did not advise the Trooper he, the defendant, would take a blood test if defendant could have his own physician present. (Page 40 of Transcript).

20. That he told Mrs. Walker he was going to arrest her for interfering with a police officer. (Page 47 of Transcript).

21. That he smelled the glass he saw Mrs. Walker dump the contents from, and it had an alcoholic odor. (Page 99 of Transcript).

In regard to the foregoing, the truth of the matter is as follows:

1. That defendant's car did not cross the center line several times and defendant's car did not cross the center line on an incline of a hill.

2. That Mrs. Walker did not dump the contents of a glass out of the window.

3. That defendant did not state to Trooper Wiltse in a belligerent tone "What do you want" and that defendant did inquire "What is the matter, Officer, was I speeding?"

4. That on the way in to Fredonia, defendant did not refuse to take a blood alcohol test, but defendant did advise that he would be glad to take a test if his doctor was present. That Trooper Wiltse asked defendant the name and address of his doctor and defendant replied Dr. C. T. Hagan, Wichita, Kansas. That Trooper Wiltse stated he was not going to wait for any damn doctor to come from Wichita.

5. That defendant did not refuse a second time to take a B.A.T. in the presence of Sheriff Harris.

6. That defendant's car was not weaving on the road.

7. That defendant did not drive his car up a hill on the wrong side of the road.

8. That defendant did not drive over onto the left-hand side of the road several times, and did not so drive on four or five occasions.

9. That defendant was not driving on both sides of the road.

10. That defendant did ask Trooper Wiltse what was the matter and did not state "What do you want?"

11. That defendant was not weaving on the road and crossing the center line numerous times and defendant did not have a belligerent attitude when defendant got out of his car.

12. That defendant did not indicate a belligerent attitude by his first words and his first words were not "What do you want?"

13. That Trooper Wiltse did slam defendant up

against the front of the Highway Patrol car.

14. That Mrs. Walker did tell Trooper Wiltse defendant's name.

15. That defendant did not state "No, I won't take a blood test."

16. That at the time of the request in No. 15, defendant did make reference to a doctor in that he stated he would be glad to take a test if his doctor was present, and that in response to request from Trooper Wiltse, defendant stated his doctor was Dr. C. T. Hagan.

17. That Trooper Wiltse did not ask defendant a second time to take a blood alcohol test in the County Jail. That there was not even a second request to take a test.

18. That defendant did not refuse for the second time to take a blood alcohol test.

19. That defendant did advise Trooper Wiltse he would take a blood test if defendant's physician was present.

20. That Trooper Wiltse did not tell Mrs. Walker he was going to arrest her for interfering with a police officer.

21. That Trooper Wiltse did not smell a glass he saw Mrs. Walker dump the contents from, as she did not dump a glass and he did not smell alcohol as no alcoholic beverage had been drunk from any glass in the car.

Further, affiant states that the above acts of perjury were knowingly made by Trooper Wiltse and resulted in

defendant's conviction of driving while under the influence of intoxicating liquor and reckless driving.

Further, affiant, knowing full well his constitutional rights, stipulates and agrees to take a lie detector (polygraph) test as to the truth or falsity of the foregoing and stipulates that the foregoing tests may be introduced as evidence in any court of law, whether heretofore tried or any subsequent charges, as valid admissable evidence.

Also, affiant knowing full well his legal rights, stipulates and agrees to the State of Kansas giving a lie detector (polygraph) test to Trooper Walter Wiltse as to the truth or falsity of allegations set forth herein, and stipulates that the results of said test may be introduced as valid evidence in any court of law in proceedings, whether heretofore tried or instituted subsequent hereto.

ROBERT M. WALKER

ATTORNEY AT LAW

SUBSCRIBED AND SWORN TO before me, a Notary Public, this 20th day of November, 1967.

Helen Puffer

Notary Public

My Commission Expires: April 17, 1971.

CERTIFICATE OF MAILING

I hereby certify that a copy of the above and foregoing Affidavit of Perjury was mailed to Mr. Robert C. Londerholm, Attorney General of the State of Kansas, State Office Building, Topeka, Kansas and a copy to Mr. Donald C. Vosburgh, County Attorney, Wilson County, Fredonia,

Kansas, on this *20th* day of November, 1967.

/s/ Robert M. Walker

Robert M. Walker

NOTICE OF APPEAL

TO: Mr. Robert C. Londerholm, Attorney General for the State of Kansas

Take notice that the Defendant in the matter of the State of Kansas vs. Robert M. Walker, Defendant, Case No. 18809, District Court of Wilson County, Kansas, has and does appeal to the Supreme Court of the United States from the findings and judgment rendered and made in the District Court of Wilson County, Kansas on March 12, 1966 and has and does appeal from affirmation of the same matter made by the Supreme Court of the State of Kansas as to Counts II and III on July 17, 1967 to the Supreme Court of the United States.

Dated this 20th day of November, 1967.

Robert M. Walker

Attorney for Defendant

ACKNOWLEDGEMENT OF SERVICE

I hereby acknowledge receipt of a copy of the Notice of Appeal filed in the above case on this 20th day of November, 1967.

Robert C. Londerholm

NOTICE OF APPEAL

TO: Mr. Donald C. Vosburgh, Attorney for the Plaintiff (Appellee), Fredonia, Kansas

Take notice that the Defendant in the matter of the State of Kansas vs. Robert M. Walker, Defendant, Case

No. 18809, District Court of Wilson County, Kansas, has and does appeal to the Supreme Court of the United States from the findings and judgment rendered and made in the District Court of Wilson County, Kansas on March 12, 1966 and has and does appeal from affirmations of the same matter made by the Supreme Court of the State of Kansas as to Counts II and III on July 17, 1967 to the Supreme Court of the United States.

Dated this 20th day of November, 1967.

Robert M. Walker
Attorney for Defendant

ACKNOWLEDGEMENT OF SERVICE

I hereby acknowledge receipt of a copy of the Notice of Appeal filed in the above case on this 20th day of November, 1967.

Donald C. Vosburgh

SPECIFICATIONS OF ERROR

1. That the Trial Court erred in refusing to discharge the Defendant from charges brought against the Defendant under Counts II, and III at the conclusion of presentation of evidence by the State.

2. That the Trial Court erred in refusing to let the Defendant testify as to material matters, while allowing Trooper Wiltse to give his opinion, and in refusing to allow the Defendant to do so even though a proper foundation was laid.

3. That the Court erred in admitting into evidence statements made or alleged to have been made by Defendant to police subsequent to arrest when Defendant had

requested an attorney, and which statements were prejudicial and incriminating.

4. That the Court erred in allowing testimony as to conversations and answers resulting from custodial interrogations, and without advising Defendant of his constitutional rights, and which testimony was in conflict with testimony of Defendant.

5. That the Court erred in not discharging the Defendant from Count II and in allowing this count to be considered in conjunction with Count III, regarding which the Court allowed inadmissable and prejudicial evidence to be submitted for consideration by the jury.

6. That the Court erred in admitting evidence resulting after Defendant had requested the presence of an independent witness.

7. That the trial court erred in overruling Defendant's motion for a new trial and the Kansas Supreme Court erred in not sustaining motion for a new hearing.

CERTIFICATE

The foregoing is a true and correct Abstract of the Record in the above entitled matter.

By Robert M. Walker, Attorney
for Appellant.